CONSUMER PROTECTION AND HIGHER EDUCATION—STUDENT SUITS AGAINST SCHOOLS

A student undertakes a two-year course of study upon the conclusion of which, she is assured by the school faculty and administrators, she will be qualified to teach mentally retarded children. Two years later, upon successful completion of the course of study, the student discovers she is not qualified for the job she just spent a great deal of time and money training for. She sues the university to recover her expenses and lost earnings.[1]

A student applies for acceptance to a university and, upon admission, is required to pay tuition for one term in advance. He pays the deposit but decides to go elsewhere one day before th term begins and is unable to recover any of the deposit. He sues the school to recover his money.[2]

An admission brochure to a college advertises unbelievable recreational and scenic attractions to enhance one's education. Upon arrival at the school, the matriculant finds the cultural and geographic setting not so idyllic—the representations of the brochure were indeed not to be believed! The school is prosecuted for criminal misrepresentation.[3]

A student enrolled in a prestigious university takes a course described in its catalogue as a prerequisite for further upper level courses in the field. She takes the course and finds it does not meet the catalogue description and realizes that she has not learned what she felt she would from the course. She sues the school to recover for her lost time and money.[4]

The above are but a few examples of the rapidly developing area

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[1] This case is based on a suit filed against Ohio State University. Ojalvo v. Ohio State Univ., No. 75-0602 (Ohio Ct. Cl. 1976). (The case was transferred to the Ohio Court of Claims and a settlement has been negotiated which will soon be entered on record in that court.) The plaintiff took a two-year course in order to qualify herself to teach the mentally retarded only to find out that more education is always required by the state for such a position.

[2] This case is based on Drucker v. New York Univ., 57 Misc. 2d 937, 293 N.Y.S.2d 923 (N.Y. City Ct. 1968), *rev'd*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969), *aff'd without opinion*, 308 N.Y.S.2d 644 (App. Div. 1970). The student sued to recover such a deposit and won in the trial court only to be reversed on appeal.

[3] This case is based on State v. Jost, 127 Vt. 120, 241 A.2d 316 (1968). The supreme court remanded for a new trial on the charge of false advertising by a school.

[4] This case is based on Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972). The case is annotated in 51 A.L.R.3d 991 (1972). The plaintiff was an elderly woman who sued the school when it cancelled a course in which she was enrolled in mid-term due to a campus disruption in protest of the Vietnam War.

of the law that is here labelled "consumer protection and higher education." The movement is a part of the larger trend in the recent past toward an increased consumer awareness and activism, and has developed as a distinct entity in the law only within the last four years.[5] It is an area of the law that has few direct precedents, but it may draw upon many analogous areas, as will surely be seen in the near future. This Comment discusses the types of problems that are found in this general subject and analyzes the legal theories that are likely to be relied upon by potential litigants. Concluding remarks will deal with appropriate solutions to the problems.

I. THE SCOPE OF THE PROBLEM

Labelling the problem at hand as one of "consumer protection" is a gross oversimplification, for within the ambit of that phrase lurks a number of smaller problems. They all have in common, however, the element that the student-consumer[6] is not getting what he was promised or otherwise deserves to receive from a particular college or university.[7] It will be seen that many of the abuses listed below are easily quantifiable, or at least as quantifiable as is normally the case in civil litigation. But other abuses defy quantification or objective evaluation and involve inherently subjective value judgments. The literature on the topic is limited but suggests a number of the following practices are widespread in educational institutions across the country.[8]

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[5] *See* Address by Virginia Knauer to Second National Conference on Consumer Protection in Postsecondary Education, in Knoxville, Tennessee, November 1974, in EDUCATION COMMISSION OF THE STATES, REPORT OF THE SECOND NATIONAL CONFERENCE ON CONSUMER PROTECTION IN POSTSECONDARY EDUCATION, Report No. 64, at 12-14 (1975).

In an article that parallels this one for the area of primary and secondary education, it is stated that "[t]here is virtually no law in this area. The legal basis for this kind of action will be constructed from general principles . . . and by analogy . . . ." Comment, *Educational Malpractice*, 124 U. PA. L. REV. 755, 756 (1976).

For an extensive bibliography of the recently developed literature on this topic in general, see Stark, *The Many Faces of Consumerism*, in PROMOTING CONSUMER PROTECTION FOR STUDENTS 95-100 (J. Stark ed.) (New Directions for Higher Education No. 13, 1976).

[6] The consumer of educational services is, of course, the student. This is not a startling concept but has only lately emerged in the literature. *See, e.g.*, Address by Sandra Willett to Annual Meeting of the Association of American Colleges, January 1975, Presentation at Annual Meeting of the Association of American Colleges (unpublished manuscript). *See also* Stark, *The Emerging Consumer Movement in Education*, in PROMOTING CONSUMER PROTECTION FOR STUDENTS 1 (J. Stark ed. 1976).

[7] This paper will not deal with so-called "proprietary schools," operated for profit, which tend to be vocational or technical in nature. Most of the arguments and discussion contained herein, however, are at least analogous, if not directly applicable, to that situation; and some of the citations given deal with proprietary schools, since more litigation has centered on them in the past than on the more traditional schools. For a discussion of this issue in the primary and secondary school context, see Comment, *Educational Malpractice*, *supra* note 5.

[8] For lists of abuses, see Address by Sandra Willett, *supra* note 6; *Toward a Federal*

—Due to the present trend of declining enrollments schools are forced into keen competition for students.[9] This has led to deceptive advertising and other misrepresentations by schools and their admissions staffs to lure students to the often hard-pressed school.

—The trend toward declining student enrollment has led to overly aggressive recruiting of students by admissions and other school personnel.[10] This entails an active role by school staff, beyond mere written representations: enticing students with bloated claims about the school, guaranteeing unavailable benefits, and unduly criticizing the school's competition.

—Schools have begun to emphasize in extensive media advertising the climate of its geographic surroundings.[11]

—Schools have promised, explicitly or implicitly, job placement for its students upon graduation, and then failed to provide the jobs promised or any jobs at all.

—Schools demand and get tuition deposits to hold an accepted student's place in his class and then refuse to return all or most of the deposit if the student decides not to formally enroll.

—The student who has paid a full term's tuition drops out early in the term, for good reasons or bad, yet is unable to get back more than a small fraction of the tuition and fees already paid.

—Significant raises in tuition or fee charges after a student has enrolled are effectively forced down a student's throat, since he is too far along to change his plans.[12]

—Schools make a special effort to attract veterans, with their GI Bill benefits backing them up, into programs not suited for the individual involved.

—Schools encourage students to take out federally guaranteed loans, which have an incredibly high rate of default.[13] Defaults on such loans are due in part to deadbeat students but also in part to deceptive practices of schools.[14]

—A student has progressed substantially toward his anticipated

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Strategy for Protection of the Consumer in Education, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SUBCOMMITTEE ON EDUCATIONAL CONSUMER PROTECTION, THE FEDERAL INTERAGENCY COMMITTEE ON EDUCATION (1975), at 11; Stark, *The Emerging Consumer Movement in Education*, *supra* note 6.

[9] *See Quest for Students Leads Many Colleges to Adopt Sales Techniques Once Shunned on Campuses*, CHRONICLE OF HIGHER EDUCATION, May 13, 1974, at 1, 7-9.

[10] *Id.*

[11] *Id.*

[12] *See Medical Students Sue Their School, Hoping to Block Tuition Increase*, CHRONICLE OF HIGHER EDUCATION, September 2, 1975, at 11.

[13] *See* Address by Sandra Willett, *supra* note 6, at 9.

[14] *Id.*; Thomas, The Effectiveness of the Guaranteed Student Loan Program as Applied to the College Student Today (unpublished manuscript).

degree when the school changes its degree requirements and even imposes them retroactively upon currently enrolled students.[15]

—A student completes all requirements that he was told were necessary to attain a certain degree only to find out that he has not met the actual requirements of the school.

—Schools have told their students that completion of a course of study will qualify them for certain employment when in fact it will not.[16]

—Courses that are promised to be offered periodically are not offered when promised, if at all. Professors who are supposed to teach certain courses or at certain times never do so.

—Courses are abruptly cancelled in midterm.[17]

—A school fails to give its students the type of intellectually stimulating, quality education they desire. A professor, through inadvertence or intention, offers a course that could only be considered of no value to the students.[18]

II. THEORIES OF RECOVERY

In the limited number of suits that fit the category of "consumer protection and higher education," a number of legal theories have been advanced in an attempt to recover for alleged losses. Some are more apposite than others, and some more successful than others, but all are sought to be applied in a somewhat new context. The most often attempted theory is one of contract law. Also tried are the tort claims of negligence, misrepresentation or fraud, breach of statutory duty, and the denial of a constitutional right.[19]

A. *Contract Theory*

Contract law is the basis of the claim most often relied upon by students suing their college or university.[20] This theory posits an ex-

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[15] *See, e.g.*, Mahavongsanan v. Hall, 401 F. Supp. 381 (N.D. Ga. 1975), *rev'd*, 529 F.2d 448 (5th Cir. 1976).

[16] *See, e.g.*, Ojalvo v. Ohio State Univ., No. 75-0602 (Ohio Ct. Cl. 1976); note 1 *supra*.

[17] *See, e.g.*, Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972).

[18] *See Students Filing Consumer Suits*, CHRONICLE OF HIGHER EDUCATION, November 24, 1975, at 1, 10. This article cites two pending cases in which students are alleging that their courses were "worthless" and "pure junk." *See also Suing for Not Learning*, TIME, Mar. 3, 1975, at 73. This is essentially a complaint about the quality of one's educational experience, and represents a very subjective and hard to measure damage to the student. This will probably be the most difficult case for which to recover. *See* sections II-IV *infra*.

[19] Defenses to these theories are discussed in section III *infra*.

[20] *See, e.g.*, Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928); Drucker v. New

press or implied contract between the student and school. The consideration from the student is the payment of tuition and fees and the promise to abide by reasonable regulations; from the school comes provision of academic and other services. The terms of the contract are usually said to be found in the relevant provisions in school catalogues, bulletins, and other printed material, representations of school agents, and customs and traditions.[21] To recover on this theory the student alleges a breach of contract by the school that harms him. The nature of the breach can run the gamut of the abuses suggested earlier, as almost all elements of the student-school relationship are arguably covered by the terms of this partially written contract whose terms are pieced together by collecting various written and oral representations of the school.

On the basis of prior holdings, courts are almost certain to accept the contract analysis as at least one of the analytical frameworks within which it will operate in student-school litigation. Cases can be found well back into the nineteenth century whose holdings in this context are based on contract law,[22] though they have not been consumer oriented suits. Courts have not always been enthusiastic about using contract law, because it is not on all fours with the student-school relationship,[23] but nevertheless it remains the most enduring

York Univ., 57 Misc. 2d 937, 293 N.Y.S.2d 923 (N.Y. City Ct. 1968), *rev'd*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969), *aff'd without opinion*, 308 N.Y.S.2d 644 (App. Div. 1970); Stad v. Grace Downs Model and Air Career School, 65 Misc. 2d 1095, 319 N.Y.S.2d 918 (N.Y. City Ct. 1971); Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144 (1901); Southern Methodist Univ. v. Evans, 131 Tex. 333, 115 S.W.2d 622 (1938); Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1974) [hereinafter cited as *Contract Law*]; Note, *The Student-School Relationship: Toward A Unitary Theory*, 5 SUFF. L. REV. 468 (1971) [hereinafter cited as *Unitary Theory*]. All of these and many others identify the student-school relationship as one of contract in post-secondary education.

[21] *See, e.g.*, Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); Drucker v. New York Univ., 57 Misc. 2d 937, 293 N.Y.S.2d 923 (N.Y. City Ct. 1968), *rev'd*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969), *aff'd without opinion*, 308 N.Y.S.2d 644 (App. Div. 1970); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967); Note, *Contract Law, supra* note 20, at 258. Customs and traditions could work in favor of either the student or school, as could the other terms of the contract, and would include such things as "one hour credit" representing one hour per week and not one hour per term, as the phrase might literally be read, a class "hour" being only fifty minutes or forty-eight minutes, a class having a certain emphasis over past years, and other concepts that are nowhere spelled out explicitly but are "understood" by most people associated with post-secondary education or by most people at an individual school.

[22] *See, e.g.*, State *ex rel.* Stallard v. White, 82 Ind. 278 (1882). *Cf.* Note, *Contract Law, supra* note 20.

[23] Note, *Unitary Theory, supra* note 20, at 474-79 discusses the student-school contract and concludes that, while it is the most popular theory used in this context, it is not entirely appropriate. Instead, a "unitary theory" is found to be a better means of analysis. *See also* K. ALEXANDER & E. SOLOMON, COLLEGE AND UNIVERSITY LAW 413 (1972), where it is said that the contract theory is particularly uncomfortable in the public school context since these schools

and pervasive legal theory used in this area.[24]

Assuming that a court accepts breach of contract as the proper claim for a student to advance, recovery by the student is still not assured. What the precise terms of any contract are can be quite troublesome. Initially the court must determine the breadth of the contract—does it cover only items explicitly mentioned in the school's written and oral representations, or will a large number of implied terms be added by custom and tradition or other reasonable expectations? The more concrete, quantifiable aspects of the student-school relationship fit contract analysis very well and would likely be included in any contract found to exist. These include tuition and fee charges, specific course offerings, requirements to be met to obtain a degree, and any disciplinary regulations the school may have published.[25] But some rather amorphous items that do not fit contract analysis as well are less likely to be included in any contract. These include the quality of educational experience promised or at least expected in the absence of a promise, the value of a particular course, and aesthetic considerations.[26] In the final analysis a court may simply be faced with a common-sense decision as to precisely what falls within the ambit of any contract between a student and his school. Parties could argue for broad and narrow interpretations and both be on solid legal foundations.

While written statements in materials such as school catalogues will constitute most of the terms of any contract, simply because they will be the easiest to show, oral representations of school agents can also become an element of the contract.[27] A problem arises when written and oral terms conflict and a student relies on the oral statements of a faculty member or administrator only to discover he has not complied with the school's written policies. If the student's reliance was justifiable the school should be estopped to deny the student the right to continue to rely on the oral representations made to him,

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generally must accept all applicants and the contract element of freely entering into a bargain is thus lacking.

[24] *See* Note, *Contract Law*, *supra* note 20. *See also*, Ryan v. Hofstra Univ., 67 Misc. 2d 651, 324 N.Y.S.2d 964 (Sup. Ct. 1971); Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95 (1973).

[25] Disciplinary regulations are a part of any contract and abiding by them represents one basic element of what the student promises to do as his part of the contract. *See* notes 20 & 21 *supra*.

[26] *See* note 18 *supra*. Some courts have also held that the contract includes an understanding that the school has nearly total discretion to change at least the academic requirements, even after a student is nearly finished with a particular course of study. *See* Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976).

[27] *See* note 21 *supra* and accompanying text.

and some courts have so held.[28] Such holdings are based upon the notion that a principal is to be bound by the representations of its agent.[29]

Even if it has been determined that a student-school contract exists and that its terms encompass the conduct in question, recovery is still not certain. It must first be determined that there was a breach of the relevant portion of the contract. Unlike more sophisticated documents, this contract does not spell out what constitutes a breach, principally because the contract analysis is superimposed upon a relationship probably not initially conceived by the parties as being contractual in nature. The doctrine of substantial performance would probably apply to this contract, so that the school would only need to substantially perform to be able to demand that the student perform his part of the bargain (usually a promise to pay money).[30] But substantial performance is not a complete discharge of duty for the school; it merely triggers the student's duty to perform and indicates that any harm done to the student will be relatively small.[31] If the breach is *de minimis* the student will be denied recovery altogether, and the student would be unlikely to bring a suit for such a breach in the first place. Much depends on the nature of the breach charged by the student. If it involves an abuse that is readily quantified, then delineating the terms of the contract, and thus its breach, will be relatively easy. But as one deals with less measurable problems it is very hard to determine if a breach has occurred because of the subjective element necessarily involved.[32] Courts may well be hesitant to substitute their subjective value judgments for those of educators who supposedly have an expertise in these areas.[33]

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[28] Healy v. Larson, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. 1971), *aff'd*, 42 App. Div. 2d 1051, 348 N.Y.S.2d 971 (1973), *aff'd without opinion*, 35 N.Y.2d 653, 360 N.Y.S.2d 419 (1974); Blank v. Board of Educ., 51 Misc. 2d 724, 273 N.Y.S.2d 796 (Sup. Ct. 1966). Both of these cases estopped a school from denying a plaintiff his degree when he complied with the requirements outlined to him by administrators and faculty, which turned out to be inconsistent with general university policy. This rationale is cryptically questioned in Wong v. Regents of University of Calif., 15 Cal. App. 3d 823, 93 Cal. Rptr. 502 (1971).

[29] *See generally* W. SEAVEY, AGENCY §§ 55 & 57 (1964).

[30] *See* 3A A. CORBIN CONTRACTS, §§ 700-12 (1960).

[31] *Id.* § 702.

[32] *Students Filing Consumer Suits, supra* note 18, reports that the case suggested in the text at note 12, *supra*, was dismissed as a contract action, even though an $1800 tuition increase came after catalogue statements that only $200 increases were to be expected. The article suggests that vague catalogue language was at least in part responsible for how the case was resolved.

[33] *Id.* The author suggests that the reluctance of courts to substitute their judgment for that of academicians as a reason for the lack of success of most educational consumer suits. On the difficulty of courts in evaluating academic performance, see Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1070 (1969). *See* note 100 *infra*.

If the student does establish a breach of contract, the amount of damages suffered will often be speculative or at least very hard to show. Again it is unwise to generalize for there are some areas that lend themselves relatively easily[34] to damage calculation, such as cancellation of a course in mid-term, repudiation of a room or board contract, or failure to provide a special service or activity paid for separately. But other types of damages defy valuation in normal terms. It will not be easy to calculate the harm in failing to learn enough about a given subject, especially if the subject is not related to the student's chosen future vocation. It is simply hard to value in money terms the benefits of being a well-educated person.[35] Of course, it is also hard to value a human life or periods of pain and suffering, yet courts have had only minimal qualms about doing so. But in those cases courts tend to feel compelled to allow some award because it is so clear that the plaintiff has been seriously harmed. That serious a harm would be rare in the context of consumer protection and higher education. Thus in many cases damages will simply be considered so speculative that a total denial of recovery will result.[36]

At least one student has tried to recover on a third-party beneficiary contract claim.[37] This claim stated that the student was a beneficiary of the contract between the university and a professor and thus was able to recover for the failure of the professor to teach in accord with his contract. The court held this was not a claim upon which

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[34] The phrase "relatively easy" is deliberately chosen. Damage calculations are probably only occasionally "easy" to determine.

[35] For a case in which the plaintiff sought restitution of tuition and recovery of expenses for books and the like, see *Students Filing Consumer Suits*, *supra* note 18. *See also* Trustees of Columbia Univ. v. Jacobsen, 53 N.J. Super. 574, 148 A.2d 63 (App. Div.), *appeal dismissed*, 31 N.J. 211, 156 A.2d 251 (1959). In this case, the defendant-student alleged in a counterclaim that Columbia

> had represented that it would teach defendant wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, courage, beauty, and similar virtues and qualities; that it would develop the whole man, maturity, well-roundedness, objective thinking and the like; and that because it had failed to do so it was guilty of misrepresentation, to defendant's pecuniary damage.

53 N.J. Super. at 576, 148 A.2d at 64. The counterclaim also quoted from "college catalogues and brochures, inscriptions over University buildings and addresses from University officers." *Id.* at 577, 148 A.2d at 64-65. Summary judgment was granted for Columbia on this counterclaim, but the allegations well illustrate how subjective some elements of an education are and how hard they would be to value. *Cf.* Mahavongsanan v. Hall, 401 F. Supp. 381 (N.D. Ga. 1975), *rev'd*, 529 F.2d 448 (5th Cir. 1976), in which the district court awarded one dollar in damages, accompanying an order compelling the school to grant the plaintiff a diploma.

[36] "In order to be entitled to [recovery] the plaintiff must lay a basis for a reasonable estimate of the extent of his harm, measured in money." 5 A. CORBIN, *supra* note 30, § 1020.

[37] Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972).

relief could be granted but gave no reasons for doing so.[38] This is the proper result, since a student is only an incidental beneficiary of such a contract and, as such, not able to recover on that basis.[39]

The statute of frauds should present no bar to recovery.[40] There is a new contract every academic term, so no contract to be performed over a year from its formation is involved. Since there is no sale of goods, it is of no import that the contract consideration may be greater than the statutory cutoff point (usually $500).[41] These are the only portions of the statute that could arguably apply to this contract. Even if the statute of frauds did apply, one could in most cases piece together enough writings to satisfy the statute's requirement of a writing, for the statute does not require an integrated contract. The writing would have to be signed by the party to be charged—the school—but the school's name on the documents[42] or signatures of its agents[43] should suffice.

One contract doctrine working in favor of the student-plaintiff is that of contracts of adhesion.[44] This doctrine cuts against the general rule of freedom of contract and allows a court to refuse to enforce contracts that are excessively one-sided. "Standardized contracts . . . drafted by powerful commercial units and put before individuals on the 'accept this or get nothing' basis are carefully scrutinized by the courts for the purpose of avoiding enforcement of 'unconscionable' clauses."[45] Since the terms of a contract are found largely in school-authored documents and the student has almost no bargaining power, the contract of adhesion approach is quite appropriate in this context. While the doctrine is most often applied when there is a near monopoly on a supply of goods or services,[46] it has also been applied when there is what could be called a "de facto monopoly"—a large number of suppliers offering the same harsh

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[38] *Id.* at 11, 101 Cal. Rptr. at 505.

[39] To recover as a third-party beneficiary of a contract between two other parties, the parties to the contract must have "intended" to benefit the third-party and not merely have "incidentally" benefitted that person. *See* 4 A. CORBIN, *supra* note 30, §§ 776, 779C; RESTATEMENT OF CONTRACTS, § 147 (1932).

[40] On the statute of frauds generally, see 2 A. CORBIN, *supra* note 30, §§ 275-531; OHIO REV. CODE ANN. ch. 1335 (Page 1975).

[41] UNIFORM COMMERCIAL CODE § 2-201.

[42] 2 A. CORBIN, *supra* note 30, § 520 (though there might have to be an intention to adopt this as a signature).

[43] *Id.* § 525.

[44] Note, *Contract Law*, *supra* note 20, at 265-66; Note, *Unitary Theory*, *supra* note 20, at 479.

[45] 6A A. CORBIN, *supra* note 30, § 1376.

[46] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), applying the doctrine to automobile manufacturers, from which there are only a handful to choose.

terms,[47] giving the consumer no meaningful choice. That the consumer of education has no meaningful choice on some terms of the educational contract, such as tuition and fee refunds, goes without saying. This is not to say that the entire contract is unconscionable per se, for that would preclude the existence of any contract in which one party is a large commercial, or educational entity;[48] rather it is to say that a contract between parties of grossly disparate bargaining power should be closely scrutinized for any unconscionable terms. Only the unconscionable terms need be invalidated, for a court can refuse to enforce one term of a contract without declaring the entire contract void[49]—and surely not all aspects of the student-school contract are harsh and oppressive.

Thus, by using the contract of adhesion approach, a student should be able to avoid particularly harsh aspects of the student-school contractual relationship. The most likely recovery under this approach would be for niggardly refund policies closely resembling penalties, which are generally disallowed in contract law.[50] A student would thus be able to recover his entire deposit less actual damages incurred by the school,[51] instead of the arbitrary or nonexistent recovery now available, which is largely unrelated to the actual harm suffered by the school.[52] Other areas of abuse also lend themselves

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[47] The typical situation envisioned here is a contract with insurance companies; there are many to choose from but no real choice exists since they all offer essentially the same, sometimes harsh terms. *See* 6A A. CORBIN, *supra* note 30, § 1376.

[48] For a discussion of whether schools today are commercial entities as much as educational institutions, see note 91 *infra* and accompanying text.

[49] *Cf.* UNIFORM COMMERCIAL CODE § 2-302.

[50] *See, e.g.*, Priebe & Sons v. United States, 332 U.S. 407 (1947). *See also* 5 A. CORBIN, *supra* note 30, § 1057. While it could be argued that the sum retained represents liquidated damages, as such it would have to be a "genuine pre-estimate" of damages. *Id.* § 1059. If it is a "genuine pre-estimate" of damages, then the school may keep the sum; if not, which is the assumption here, then the liquidated damages provison is a nullity. *Id.*

[51] This assumes the school's costs are indeed less than the deposited amount. This may not be the case and would be a question of fact to be resolved at trial, but would make no difference as to the principle involved. If student demands for acceptance far exceeded available positions and schools could accept applicants only as first-year students, as in many professional schools today, the school could argue that its damages were actually much greater than the deposit; for if the student drops out after a certain point it may be too late to ever fill his position, because students must all begin at the same time. Thus the school would lose the expected tuition payments over the balance of what would have been the student's academic career there.

[52] This general theory was accepted by one court, though reversed on appeal. Drucker v. New York Univ., 57 Misc. 2d 937, 293 N.Y.S.2d 923 (N.Y. City Ct. 1968), *rev'd*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969), *aff'd without opinion*, 308 N.Y.S.2d 644 (App. Div. 1970). The reversal relied on the concept that the student could not recover because he had committed a breach of contract and one who does so may not be heard to seek recovery of his losses. This is an outdated idea and has been rejected by some courts that have held a defaulting party may recover on a contract, at least to the extent of preventing unjust enrichment on the

to this general analysis, such as extreme raises in tuition or fee charges, or excessively demanding conditions for student aid. But many of the problems cannot be properly handled in the contract framework and are better attacked elsewhere. Finally, it should be noted that determining whether a contract term is unconscionable is essentially a subjective judgment on the part of the court. Since it involves a myriad of social and even political factors, a sound prediction of success on the claim is impossible. And it would not be wholly irrational to hold that some school policies that seem particularly onerous to the student are actually necessary for the smooth administration of higher education.

B. *Negligence Theory*

A second legal theory often relied upon by students seeking redress from educational institutions is found in the tort doctrine of negligence.[53] This claim asserts that from the special relationship between student and school a duty arises on the part of the latter to adequately provide those services usually associated with such institutions;[54] and that the school, through its agents, has been negligent in failing to act reasonably in accord with that duty and has thus wronged the student.[55] This approach could encompass almost all of the earlier mentioned abuses and would include the failure to provide academic and physical services of adequate quality, failure of an administrator to properly supervise faculty below him, failure to disclose information to students, and failure to schedule promised courses.

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part of the other party. *See* Freedman v. The Rector, 37 Cal. 2d 16, 230 P.2d 629 (1951), and cases cited therein. The plaintiff in Dubrow v. Briansky Saratoga Ballet Center, Inc., 68 Misc. 2d 530, 327 N.Y.S.2d 501 (N.Y. City Ct. 1971), got back a tuition payment, but on the grounds that her withdrawal due to illness meant that the implied condition of the contract that she would be able to attend the school had not been met, even though her contract with the school said withdrawal for any reason meant forfeiture of all tuition. The court distinguished *Drucker*, saying her illness excused the plaintiff in this case.

[53] *See* Zumbrun v. University of So. Calif. 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); S. SANDOW, EMERGING EDUCATIONAL POLICY ISSUES IN LAW: FRAUD (1970), (containing a survey conducted at Syracuse University's Educational Policy Research Center); *Suing the Schools for Fraud: Issues and Legal Strategies*, Transcript of a Conference on Fraud in the Schools held in Washington, D. C., March 1973. The latter two sources deal largely with secondary education, but the legal theories discussed should also be applicable to post-secondary education. This Comment will deal with negligence in the consumer protection context and not garden-variety negligence actions that students and others often bring against schools, such as personal injury cases.

[54] One could talk in terms of the "reasonable school," to analogize to the "reasonable man," but it is hard to conceptualize a school being reasonable or unreasonable apart from the actions of its agents.

[55] This assumes the necessary causation, which is a question beyond the scope of this Comment.

Prior court holdings indicate that a recovery sought in tort based upon negligence is less likely than recovery in contract. But this is not an inconceivable or improper application of the law of negligence, given the proper factual setting.[56] The student would first have to establish that the school was under a duty to prevent him from being exposed to unreasonable risks.[57] No cases have been found on point in the consumer protection area, but no good reasons appear for holding there is not such a duty. Duty is "only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[58] No widely accepted test for whether a duty exists has ever been developed,[59] but since it turns largely on a judgment as to whether the plaintiff deserves legal protection, it is quite plausible that the student-school relationship would give rise to such a duty in this context, especially if the court feels a genuine problem exists and no other means have succeeded in remedying it. Next, the student would have to show that the school failed to conform to the standard required, which would presumably be that conduct done by other "reasonable" schools in similar circumstances.[60] The student would have to put forth proof to the effect that the school, through its agents, acted unreasonably and as a result caused an undue risk of harm. This question has to be resolved in all negligence cases, and no doctrinal difficulties appear with resolving it in this context. Finally the student would have to show an injury suffered as a result of the above misconduct, and that it was proximately caused by the acts of the school.[61] Again these are matters of proof that have to be analyzed in every case, and since such charges could run the entire gamut of the student-school relationship, no generalization can be made about the success of a negligence claim.

The major difficulty with predicting the success of a negligence suit by a student in the consumer role is the fact that this is a relatively novel application of negligence law. Negligence covers an unlimited scope of human conduct, however, and it has been demonstrated that nothing inherent in negligence doctrine precludes

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[56] The plaintiff in Zumbrun v. University of So. Calif., 25 Cal. App. 2d 1, 101 Cal. Rptr. 499 (1972), alleged negligence, *inter alia*, on the part of the defendants in cancelling a class in mid-term. The court did not explicitly discuss negligence, basing its holding on contract grounds, but it did not rule out negligence in overruling defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

[57] *See* W. PROSSER, TORTS §§ 20, 53 (1971).

[58] *Id.* § 53.

[59] *Id.*

[60] *Id.* §§ 30-33.

[61] *Id.* § 30.

its application here. Many situations can be hypothesized in which negligence would be appropriate: sudden tuition raises caused by negligent bookkeeping; promised courses not offered due to negligent planning by a curriculum committee; inflated promises made by admissions personnel due to negligent supervision by their superiors. This list could continue to great length but is sufficient to show that negligence should be a viable claim for a student's lawsuit in the setting of consumer protection and higher education.[62]

C. *Fraud or Misrepresentation Theory*

A tort claim more concrete than negligence is one based on misrepresentation or fraud.[63] Such complaints arise largely due to false advertising designed to lure students to a campus, and false claims about the results supposedly flowing from enrollment in certain academic programs. Misrepresentation has an element of intention in it not usually found in negligence, but on the proper facts it should be a viable cause of action for an injured student, albeit a harder one to show. Similarly, the criminal laws could come into play here since most jurisdictions have some sort of criminal fraud statute. These statutes contain the same basic elements as would a civil charge of misrepresentation,[65] although there would be the extra burden of

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[62] One problem that will arise in some cases is that negligence is usually thought to be an unintentional tort, while much of the behavior complained of will be intentional or knowing. If negligence is regarded as dealing solely with unintentional acts then it would not apply in such circumstances, but if negligence is seen as a failure to meet a certain standard of care then no problem is presented by the acts being intentional. The latter view would seem more satisfactory, for otherwise a school could defend a negligence action on the grounds that it knew what it was doing, as long as the behavior came within no other prohibited area. Negligence is often defined in terms of what a tortfeasor "knows or should have known," indicating one may be deemed negligent by the usual objective test or by a subjective test of actual knowledge of creation of an unreasonable risk. *See, e.g.*, Wire v. Williams, 270 Minn. 390, 133 N.W.2d 840 (1965); LaMarra v. Adams, 164 Pa. Super. 268, 63 A.2d 497 (1949). This is analogous to the criminal law case in which "negligence" is the culpable state of mind required to convict, yet a higher culpable state of mind (*e.g.*, "knowingly") will also meet that standard. *See, e.g.*, OHIO REV. CODE ANN. § 2901.22(E) (Page 1975).

[63] *See, e.g.*, Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); Trustees of Columbia Univ. v. Jacobsen, 53 N.J. Super. 574, 148 A.2d 63 (App. Div.), *appeal dismissed*, 31 N.J. 221, 156 A.2d 251 (1959); Ojalvo v. Ohio State Univ., No. 75-0602 (Ohio Ct. Cl. 1976); Behrend v. Ohio, No. 75-9401 (Ohio Ct. Cl., filed June 27, 1975); Southern Methodist Univ. v. Evans, 131 Tex. 333, 115 S.W.2d 622 (1938); State v. Jost, 127 Vt. 120, 241 A.2d 316 (1968). *Cf.* Stad v. Grace Downs Model and Air Career School, 65 Misc. 2d 1095, 319 N.Y.S.2d 918 (N.Y. City Ct. 1971).

[64] *But cf.* note 61 *supra*.

[65] *See, e.g.*, OHIO REV. CODE ANN. ch. 2913 (Page 1975), particularly § 2913.02 ("Theft") which proscribes a purposeful deprivation of property or services, *inter alia*, by deception. This section is very broad and certainly could be read to include the taking of tuition under the guise

proving the existence of the required culpable state of mind and all other facts beyond a reasonable doubt instead of merely by a preponderance of the evidence.

In order to recover in a civil action the student would have to establish all of the elements traditionally required for a misrepresentation claim.[66] First, the student would have to show that the school did indeed make a false statement and that it was a material false statement of fact and not of opinion, which might not be easy since many statements about the quality of an enterprise will more likely be opinion. Second, the student would have to establish scienter by showing a knowledge that the statement was false or at least that there was not a sufficient basis of information upon which to make it. Similarly the student would have to show an intent, on the part of the school through its agents, to induce this student into relying on the misstatement. These last two elements would probably be extremely hard to show, though circumstantial evidence could likely be adduced in a given case. Next the student would have to show justifiable reliance upon the misstatement, and, finally, that his reliance resulted in damage to him. Although the law of misrepresentation suggests nothing that would prohibit this application,[67] it would seem unlikely that a fact pattern sufficient to support such a claim will often exist, and the small number of cases seem to bear this out.[68] The difficulty of showing scienter and intention to mislead has been noted. Similarly, misstatements will likely consist of opinion and not fact, such as puffing in advertising. In cases of gross misrepresentation the student's reliance upon the misrepresentations may not have been justifiable. And as in a contract recovery it will be hard to show damages—or at least enough damages to make litigation feasible. For example, it would be hard to quantify the harm to one who went

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of false promises. *See also* R. PERKINS, CRIMINAL LAW 298 (1969), citing as an example IOWA CODE ANN. ch. 713 (West 1954).

[66] For the elements of misrepresentation see W. PROSSER, *supra* note 57, § 105. *See generally id.* §§ 105-10.

[67] Not many cases discuss misrepresentation because the problem is usually resolved on the contract issue. For example, in Southern Methodist Univ. v. Evans, 131 Tex. 333, 115 S.W.2d 622 (1938), the plaintiff alleged a fraudulently induced contract, but the court found no contract existed in that case and thus resolved the issue. In other cases the student has won on the contract issue and the misrepresentation issue, though raised, is never reached. *E.g.*, Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972). *Cf.* Stad v. Grace Downs Model and Air Career School, 65 Misc. 2d 1095, 319 N.Y.S.2d 918 (N.Y. City Ct. 1971).

[68] Count two of the complaint in Ojalvo v. Ohio State Univ., No. 76-0602 (Ohio Ct. Cl. 1976), is based on fraud, *i.e.* misrepresentation, but the bulk of the complaint sounds in contract. The plaintiffs in Behrend v. Ohio, No. 75-0401 (Ohio Ct. Cl., filed June 27, 1975), on the other hand, rely solely on misrepresentation. The first of these cases has been settled and the second is at a very early stage.

to Great-Plains University instead of Rocky Mountain College because of the former's claims about its scenic and recreational opportunities. Perhaps this militates in favor of use of the criminal law for deterrence of such actions since the state need not show substantial harm to anyone in order to convict.[69] And possibly the stigma of a criminal conviction would have a greater deterrent effect on schools than the possibly less costly and surely less publicized civil suit.[70]

D. *Statutory Duty Theory*

When the perpetrator of the abuse charged is a state-supported college or university the student possibly has a good claim based upon breach of a statutory duty. This claim will obviously be dependent upon the statutes of the state in question. At least one court has held that breach of a statutory duty did constitute a valid claim in the student-higher education context.[71] That case related to a duty to try to place an education student as a secondary school student-teacher. The holding was dependent on the wording of the statute in question, but the statute only spoke in general terms and did not specifically impose any duty. Nothing in the language of the case suggested other similar statutes could not yield similar holdings. The key for the student litigant is to find a statute that is on point with the student's grievance. An example of a statute that explicitly prohibits certain school abuses and even authorizes civil recovery by students is *California Education Code* § 29035.[72] This section outlaws false advertising by certain schools and provides for recovery of damages by students, including court costs and reasonable attorney fees. Such explicit statutes are not very common but provide undeniably valid

[69] *See* State v. Jost, 127 Vt. 120, 241 A.2d 316 (1968), dealing with a conviction for false advertising by a school claiming it could deliver "education and vacation." While remanding the case for retrial on the issue of whether enough proof was put forward to prove the advertisement's falsity, the court clearly said the school's agent could be held criminally liable.

[70] The school itself could be held criminally liable in some states. *See, e.g.*, OHIO REV. CODE ANN. § 2901.23 (Page 1975).

[71] James v. West Virginia Board of Regents, 322 F. Supp. 217 (S.D. W.Va.), *aff'd per curiam*, 448 F.2d 785 (4th Cir. 1971). In this case the plaintiff sought recovery based upon the failure of the school to place him as a student-teacher. Since the student was a known radical leader, the school could place him only in a distant school, though no farther from the school than the other student-teachers had found it necessary to go. The student refused to go there and claimed he should have been placed closer to the school. The court held that the statute did impose a duty upon the school, but said "[t]he extent of [the school's] duty would appear to be limited to making a good faith effort to place those of its students" in a school. 322 F. Supp. at 226. The court held that the school had complied with that duty and found for the defendant. The statute, W. VA. CODE ANN. § 18-2-6 (Michie 1975), was little more than an authorization for public schools to establish a student-teacher program.

[72] CAL. EDUC. CODE § 29035 (West 1975).

claims where available, so such avenues should always be investigated.[73] The passage of statutes authorizing a private civil remedy could be an effective legislative approach for attacking such abuses, while avoiding having to go through possibly over-burdened prosecutors' offices or a state consumer protection agency.

Unless one is dealing with a specific obligation on the part of the school, it could be difficult to make out a winning claim based upon breach of statutory duty. For example, Ohio Revised Code § 1713.03[74] gives the state board of education the power to require that higher education institutions meet certain standards in order to procure a certificate of operation from the state. While one could argue that violation of these standards constitutes an actionable breach of statutory duty, it would likely be a futile argument. For not only does the statute itself imply that withdrawal of the certificate by the state board would be the proper remedy, but Ohio Revised Code § 1713.06[75] gives the board the power (through the attorney general) to enjoin a school from operating without the certificate. So in this case, and possibly many others, an arguable general statutory duty could be found to exist but with provision for governmental and not private enforcement of the duty.[76] One commentator has argued that unless such statutes provide for a remedy by their own terms a court should not provide one, that being solely in the province of the legislature.[77]

E. *Other Theories*

Some suits may allege that a school has denied the student his constitutional right to an education.[78] This claim is a dubious one, at best, for the right to an education is not found either explicitly or implicitly in the United States Constitution.[79] State constitutions

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[73] The student could also try less explicit statutes such as OHIO REV. CODE ANN. ch. 4165 (Page Supp. 1975). § 4165.02 labels misrepresentation of services, *inter alia*, as a "deceptive trade practice", and § 4165.03 authorizes, in addition to any other remedies available, an injunction against such practices and provides for a successful party to recover court costs and attorneys' fees.

[74] OHIO REV. CODE ANN. § 1713.03 (Page 1975).

[75] *Id.* § 1713.06.

[76] For another example of a statutory provision for governmental enforcement to correct school abuses, see COLO. REV. STAT. ANN. § 12-59-114 (1974).

[77] *Suing the Schools for Fraud: Issues and Legal Strategies, supra* note 53, at 75.

[78] No case has been found alleging this for post-secondary schools, but it is often discussed in the analogous area of secondary schools. *See* note 53 *supra*.

[79] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). The Court held that, for equal protection purposes, strict scrutiny should not be used to analyze a legislative classification for education because education was not a right found explicitly or implicitly in the United States Constitution.

sometimes have some general language about this right,[80] but usually apply only to primary and secondary education and not higher education, and are too vague to provide a basis for recovery.

A litigant might want to argue for a type of strict liability for schools, akin to the strict liability that has developed for manufacturers of products.[81] But the theoretical bases for imposing strict liability upon manufacturers are inapposite in this consumer context.[82] Imposition of strict liability is a policy decision made to deter the production of unusually dangerous products, and even the worst educational abuse is hardly dangerous to human safety. The policy is also designed to protect innocent parties, but that is no more true here than in any situation since all civil litigation is designed to shift the loss from innocent parties. Strict liability is also imposed when negligence would probably be the underlying claim but would be too hard to prove to enable one to recover. But in the education context, negligence, or breach of contract, should not be extraordinarily hard to show in the cases when it does exist. Furthermore strict liability was designed to protect persons not in privity of contract with the manufacturer, while it has been shown that students are considered to be in a contractual relationship with their school.

It should be noted at this point that all of the above claims are not mutually exclusive. A given fact pattern could properly give rise to any number of claims and the student-plaintiff would be wise to plead in the alternative, as many have done.[83] For example, if the school made a misrepresentation it probably committed a breach of contract. Or a breach of contract or of a statutory duty may have been due to negligence. While application in the education setting of some of these claims may be somewhat novel, one or more claims should be successful if the factual allegations supporting them can be adequately shown.[84]

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[80] The Ohio Constitution speaks of education only as one of the things for which the legislature may expend funds and calls for a state board of education. OHIO CONST. art. VI, §§ 1-4.

[81] *See* W. PROSSER, *supra* note 57, §§ 96-104.

[82] For the bases hereinafter elaborated upon, see *id. See also* RESTATEMENT SECOND OF TORTS § 402A (1965).

[83] *E.g.*, in Zumbrun v. University of So. Calif., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972), the plaintiff alleged breach of fiduciary duties, fraud, constructive fraud, breach of warranty, misrepresentation, negligence, breach of trust, and conspiracy. In Ojalvo v. Ohio State Univ., No. 75-0602 (Ohio Ct. Cl. 1976), the complaint alleges breach of contract, fraud, and unjust enrichment.

[84] *Students Filing Consumer Suits, supra* note 18, reports that, at present at least, only the worst cases of abuse will yield recovery but that potential liability will grow in the future as this type of litigation expands from proprietary schools to traditional higher education. This analysis is almost certainly correct.

III. DEFENSES

It has been demonstrated that no doctrinal considerations stand in the way of student recovery for certain educational abuses, and the few precedents uphold this, but that is not to say that student recovery is or should be assured. A number of traditional defenses are available to counter some of the above legal theories, and in many cases the defendant's arguments would appear to be conclusive.

In the contract area there is the general notion that a plaintiff may not recover for damages that he could have prevented.[85] It would seem that in many cases a student could have prevented much of the harm inflicted upon him with some action in the early stages. For example, since he saw a course did not offer what he wanted he could have dropped it. Or once he knew a professor was off track, he could have gone to the Dean or Department Chairman. These actions would not necessarily eliminate all damages, but certainly they could reduce them.

A defense similar to the one just mentioned is the tort doctrine of contributory negligence.[86] It is certain that many consumer-type student injuries will have been caused, at least in part, by the fault of the student; thus he may not recover. In addition to the above examples, failure to inquire about academic requirements, failure to investigate a school's claims of quality, or refusal to do extra work to make up for deficient teaching could all be deemed contributory negligence. Education is a "two-way street," and for a student to fail to learn there almost has to be fault on his part as well as on the part of the professor or administrator.[87] Whether the student aggravated his damages or was contributorily negligent are questions to be determined case by case, but clearly these defenses will be among those available to a school to bar student recovery.[88]

Another tort doctrine that could bar recovery is assumption of risk.[89] The doctrine denies recovery to one who voluntarily exposed himself to a known risk and then was injured, even if by the negli-

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[85] *See* 5 A. CORBIN, *supra* note 30, § 1039. For an analogous rule see UNIFORM COMMERCIAL CODE § 2-715(B) (2). The doctrine also applies in tort law. *E.g.*, Ellerman Lines v. The President Harding, 288 F.2d 288 (2d Cir. 1961). Usually contributory negligence will be a bar to recovery when the plaintiff has contributed to his harm. *See* notes 86-88 *infra* and accompanying text.

[86] *See* W. PROSSER, *supra* note 57, §§ 65, 67. Whether this completely bars recovery (traditional contributory negligence) or merely proportionately reduces it (comparative negligence) depends on the jurisdiction and is beyond the scope of this Comment.

[87] *See Students Filing Consumer Suits*, *supra* note 18.

[88] S. SANDOW, *supra* note 53, at 20, lists contributory negligence as one of the expected defenses to cases in the consumer-education context.

[89] *See* W. PROSSER, *supra* note 57, § 68.

gence of another. A school could argue that, even if it was negligent, the student should be denied recovery since he knew that, say, getting poor professors or having a poor educational experience was one of the risks of a college education. This should be a good defense to some of the claims based upon failure to live up to a certain standard of quality, for surely it is one of the understood risks of college that some professors encountered will be lacking. Similarly, in the contract area, the school could argue that these risks are an implied term of the contract. It is customary to expect that some aspects of one's college experience will not be ideal, so a student should not be granted money damages because that turns out to be the case. But these defenses will not hold up against charges of misrepresentation, for it would be inappropriate to say that a student should expect to be lied to by school authorities. And if the student complains that an explicit written term of the student-school contract was broken, it would be inappropriate to suggest that he should reasonably have expected the breach. Since the student simply should not be required to anticipate these abuses, he has not voluntarily exposed himself to any risk.

Another possible defense would be that the student had a number of prior remedies available and should not now be allowed to seek redress in the courts. This would be similar to the notion often advanced that one must exhaust his administrative remedies before judicial remedies are available.[90] Administrative remedies available in this context might include a student government grievance procedure, intercession of a university ombudsman, or routing of complaints to a department chairman or school dean. This defense would probably be available only if the school actually had some established grievance procedure and had insisted that students use it as a first step toward any satisfaction of claims. Or the school could go beyond making it a condition precedent and insist that such a procedure be an exclusive remedy, akin to a contract provision requiring arbitration.

A defense that could defeat any claim by a student against a state supported university is the doctrine of sovereign immunity.[91]

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[90] *See, e.g.*, McLucas v. De Champlin, 421 U.S. 21 (1975); Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1 (1974); Johnson v. Robison, 415 U.S. 361 (1974). Often a statute must provide for a remedy outside the courts for this to be available. This argument was at least one factor in deciding in favor of a school-defendant in Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976). The court noted, in reversing a judgment for the plaintiff, that "[i]nstead of pursuing her grievance through the administrative remedies provided in the By-laws of the Board of Regents of the University, she brought suit." *Id.* at 450. This was especially important in finding no denial of due process. This defense was dispositive in Schwartz v. Bank Street College of Education, 381 N.Y.S.2d 282 (App. Div. 1976).

[91] *See* W. PROSSER, *supra* note 57, § 131. Sovereign immunity could also bar many claims against a state school, not just tort claims.

This bar is applied less and less by modern courts[92] but will still deny recovery in some jurisdictions when the school is considered a branch of the state government. The full scope of sovereign immunity is beyond the scope of this Comment, but it must be noted as a possible trap for the unwary litigant. A similar impediment could be the immunity granted in some circumstances to public officials acting in their official capacities.[93] This immunity does not insulate public officials altogether,[94] however, and should not be seen as a total bar to recovery. These immunities are noted as potential hurdles that the litigant will have to cross.

Finally, it should be remembered that a school always has the factual "defense" that the student has failed to adequately make out the required elements of his claim, or that the charges are simply false. The student may just fail to show that the school breached its contract, or that it was negligent, or that it made a misrepresentation. Such arguments, touched upon earlier in the discussion of the various claims, would probably be the school's first line of attack upon a student's suit.

IV. POLICY CONSIDERATIONS

In examining any possible litigation in the area of consumer protection and higher education a number of overriding concerns should be discussed. Foremost is the basic question of whether the courts are the proper forum for the resolution of these disputes. Many of the problems in this area arguably could be better solved by legislative action, with full opportunities for all sides to be heard and all consequences discussed. The context of private litigation often does not provide a forum for all interested parties to be heard. Such a forum could be essential in an area of developing law, which lacks the benefit of precedents to guide legal decisions and to aid in predicting the consequences of a given court holding. Nevertheless, it has been shown that many traditional legal doctrines could easily be applied to this area and, on the basis of current trends, it appears that courts probably will not hesitate to take such cases. The notion that

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[92] Even if sovereign immunity does apply generally in the state, some courts have held that procurement of insurance by a state agency waives the immunity, at least to the extent of the insurance coverage. *See, e.g.*, Taylor v. Knox County Bd. of Educ., 292 Ky. 767, 167 S.W.2d 700 (1942); Vendrell v. School Dist. No. 266, 226 Or. 263, 360 P.2d 282 (1961). *See also* OHIO REV. CODE ANN. ch. 2743 (Page 1975), which waives Ohio's sovereign immunity.

[93] *See* W. PROSSER, *supra* note 57, § 132.

[94] *E.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974) and Wood v. Strickland, 420 U.S. 308 (1975), grant state executive officers and local school board officials, respectively, only qualified immunity under 42 U.S.C. § 1983.

institutions dedicated to helping others should not be amenable to lawsuits, which once held sway in the form of the doctrine of charitable immunity, is almost a dead letter today.[95] One recent case has brought home the idea that institutions of higher education are in many senses big business and not merely ivory towers set apart from reality.[96] So the courts are likely to be the forum to resolve these problems, absent legislative or other action to prevent growth of the problem, and the law must be ready to deal with the cases that will surely be presented.

One possible way of lessening the problem of the lack of presentation of all points of view in such litigation would be to include more parties through the vehicle of a class action. Students could band together in a class action against a school if the school had acted similarly toward a large group of students and the other prerequisites for a class action were met.[97] This situation could arise in either a contract or misrepresentation action based on a false written statement, since all students would have an identical claim if all were affected in the same manner. In other cases the group may not be large enough to be eligible for a class action but could still overcome some of the high costs of litigation by the joinder of plaintiffs.[98] Joining a large number of students could also lessen the problem of small damage recoveries, avoiding the bar of *de minimis non curat lex* and making litigation financially feasible.[99] It seems probable, however, that in many circumstances a school will not have acted

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[95] *See* W. PROSSER, *supra* note 57, § 133.

[96] Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 302 F. Supp. 459 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). In holding that education was trade or commerce for purposes of the Sherman Antitrust Act, the district court said: "Higher education in America today possesses many of the attributes of business. To hold otherwise would ignore the obvious and challenge reality." 302 F. Supp. at 466. The court of appeals reversed, saying that the defendant's objectives were not commercial, but did not explicitly disapprove the above statement.

[97] FED. R. CIV. P. 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

OHIO R. CIV. P. 23(A) is identical.

[98] FED. R. CIV. P. 20 allows permissive joinder of plaintiffs or defendants if there is a claim or defense arising out of the same transaction or occurrence and if there are common questions of law or fact. OHIO R. CIV. P. 20 is, with minor exceptions, identical.

[99] *Students Filing Consumer Suits*, *supra* note 18, lists the expense of lawsuits and their concomitant out-of-court settlement as reasons for the lack of success of most of these consumer suits. Similarly, the fact that students are frequently acting as their own lawyers is cited as a reason for failure.

similarly toward a large number of identifiable students and, more likely, students will not have reacted similarly to the school's action. So in most cases the class action or even joinder of plaintiffs will probably not be available, and most individuals would not be so upset as to go to the trouble of maintaining such a complex piece of litigation on their own.

A court dealing with novel types of litigation such as those suggested in this Comment could turn to public policy arguments in making its decision, since there is not a wealth of case law on point. This could militate in favor of either the student-plaintiff or the school-defendant, but should on balance be more beneficial to the former. Policy arguments in favor of schools would include a desire to encourage educational experimentation, claiming that allowing recovery for an experiment that did not work out would deter such experimentation. And in these times of financial hardship for most institutions of higher education, it could cause serious trouble to large numbers of persons if precious dollar resources were diverted out of the hands of the schools and into the pockets of students claiming injury. Finally, schools have argued that courts should not substitute their judgment for those of professional educators who are trained to evaluate the success or failure of higher education.[100]

Policy factors working in favor of students would include the deterrent effect of civil litigation upon future misconduct on the part of schools.[101] The most important policy matter working in favor of students is simply that those who have been harmed should be compensated for such harm by those who caused it. This is the philosophical underpinning of our entire system of civil litigation and no reasons have been found to totally insulate higher education from this system.

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[100] One recent case which found this argument persuasive was Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976). The court held that federal courts should not subject academic dismissals to nearly the same scrutiny as disciplinary dismissals. It apparently adopted the school's argument that the lower court's injunction constituted "an unwarranted, as well as unprecedented, judicial intrusion into matters of traditional educational decision making which are beyond the scope of judicial review." *Id.* at 449. The court also relied on Wright v. Texas So. Univ., 392 F.2d 728, 729 (5th Cir. 1968): "We know of no case which holds that colleges and universities are subject to the supervision or review of the courts in the uniform application of their academic standards." *See also* Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975), which held that a student must show bad faith or arbitrariness to challenge an academic dismissal; Nustell v. Rose, 282 Ala. 358, 211 So. 2d 489, *cert. denied*, 393 U.S. 936 (1968); Militana v. University of Miami, 236 So. 2d 162 (Fla. App. 1970); Foley v. Benedict, 122 Tex. 193, 55 S.W.2d 805 (1932). However, courts generally are not hesitant to demand of other professions (*e.g.*, doctors and accountants) that certain standards be met, despite the courts' lack of expertise in the area. For a classic example of such judicial audacity, see The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932) (Learned Hand, J.).

[101] The deterrent effect of criminal law sanctions is also to be remembered. *See* notes 72 and 73 *supra* and accompanying text.

This is not to say that all courts should welcome students with open arms and prepare to readily invade the coffers of higher education. Rather it is to say that, in at least some instances, students have been seriously harmed by certain parties and should not be denied a chance to be compensated merely because those parties happen to be institutions of higher education or because the cause of action is a bit unusual in nature.

The abuses that have been listed present more than just a problem to the aggrieved student, for they are harmful to society in a larger sense. They constitute a waste of human resources and a misallocation of social resources by artificially distorting the free market. Many of the losses are suffered by persons who can least afford to waste their time and money. And surely governmental resources are wasted when public funds are expended to financially support the school, the student, or both. The potential seriousness of these abuses indicates a need for preventive medicine rather than treatment after the fact through expensive litigation.

V. AVOIDING THE PROBLEM

This Comment has pointed out that a large number of abuses presently occur in school-student dealings,[102] making the topic of consumer protection and higher education an important one. Furthermore the likely success of at least some suits against schools has been predicted.[103] Thus the prudent course of action by all parties concerned would be an effort to avoid such lawsuits. The schools are the parties that will most assuredly be adversely affected by successful litigation, so action on their part would be an appropriate first step.[104] The simple remedy is to cease whatever perceived abuses there are—to examine the school's policies to see if any of the aforementioned problems exist and to take positive action to stop them. More specifically, the school should examine just what it is promising students in catalogues, bulletins, and other written and oral respresentations to see if these representations, which could be deemed part of the student-school contract, mesh with reality. Similarly, the school should examine what its agents are telling both prospective and current students to see if they are making statements that might come back to haunt the school in the form of a misrepresentation charge.

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[102] *See* section I *supra*.

[103] *See* sections II-IV *supra*, especially note 83 *supra*.

[104] This assumes the school is conscientious both in trying to avoid lawsuits and to avoid harming their students. If a school is intentionally perpetrating the abuses, then suggested voluntary action on their part would probably fall on deaf ears.

Preventing negligence would be harder to do and could never be totally successful—the only suggestion would be for superiors to keep a close eye on the work of subordinates to try to make sure they are meeting reasonable standards. Breach of statutory duty claims could be avoided by a check of all statutorily imposed programs against the terms of the relevant statute. Essentially, what a school wishing to avoid litigation can do is to make sure that it is meeting all duties that it imposes upon itself (by contract or representations) or that are imposed by law (by statute and negligence law). Any change could be in one of two forms. The school could change what is expected of it by changing catalogue provisions and the like,[105] or even by lobbying for changes in statutory obligations. On the other hand, the school could change what it is doing to conform with what has been expected of it. The latter would be a more satisfactory solution, but the former is more easily and quickly done and will be adopted by pragmatic schools or those with resource constraints upon program offerings.

A school could also insist upon a disclaimer of liability from all students. The disclaimer could be a condition of enrollment and should be in writing and signed by the student, or otherwise conspicuously brought to his attention. This could be enforced as a part of the student-school contract,[106] although it would border on unconscionability. The contract is already excessively one-sided and this might be the next step needed to label it as a contract of adhesion.[107] The disclaimer could also run into difficulties in negligence actions since it is often hard to disclaim liability for negligence.[108] A school could also establish a grievance procedure of the sort discussed earlier, if for no other reason than to be able to claim in court that a student who failed to exhaust this administrative remedy should be denied access to the courts. A fair grievance procedure, such as an ombudsman program, could probably go a long way in heading off suits in the first place, making it a good investment for the school.[109]

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[105] *See, e.g.*, University of Akron Bulletin, School of Law Edition 1 (1975): "The University of Akron reserves the right to change without notice any of the information, requirements, regulations, or fee structure, published in this Bulletin. The Bulletin is not to be regarded as a contract." For a similar disclaimer see Robinson v. University of Miami, 100 So. 2d 442, 443 (Fla. App.), *cert. denied*, 104 So. 2d 595 (Fla. 1958).

[106] *See* section II.A. *supra*.

[107] *Id.*

[108] W. PROSSER, *supra* note 57, § 68. Prosser says ordinarily one can disclaim in advance holding another liable for negligence, but not if one party is at an obvious bargaining advantage and forces the disclaimer upon another. This, of course, resembles the contract of adhesion analysis. *See* Robinson v. University of Miami, 100 So. 2d 442 (Fla. App.), *cert. denied*, 100 So. 2d 595 (Fla. 1958), in which a catalogue reservation of the right to expel a student apparently was helpful in finding an expulsion actionable.

[109] *See* note 90 *supra* and accompanying text. A fair grievance procedure could also defeat

The above actions focus upon what a school can do at least to cover itself, if not to solve the underlying problems. But many schools will be unable or unwilling to invoke such changes for a variety of reasons, so other action could be necessary if the problems persist.[110] One possibility is external regulation. The entity that first comes to mind when regulation is mentioned is the federal government. It could play a significant regulatory role because of the huge amount of leverage it has over most institutions of higher education in the form of grants, subsidies, loan guarantees, and other financial considerations. Such funding could be made conditional upon compliance with a set of regulations, established by a federal or private agency designed to prevent as many of the abuses as possible that hurt the student as a consumer. Once again, though, one runs into the problem that some of the abuses are easily measured and thus could be easily reformed or at least monitored, while other abuses are less quantifiable and too amorphous to be readily controlled. So any such regulations would be able to attack a limited number of the abuses that are common today. State governments also have leverage over schools in the state, especially public schools, in the form of funding and the power to license.[111] State government regulation would have the advantage of being better able to recognize the needs of local students and schools, though this might also result in more bowing to political pressures, which schools could more likely muster than students.

Another group with significant leverage over institutions of higher education is the private accrediting associations. They could play an important role in preventing consumer abuses by conditioning accreditation upon compliance with standards designed to cut down on such abuses, much as they now condition accreditation upon compliance with certain academic and other standards. Such groups, largely composed of professional educators, might be better suited to deal with some of the less measurable abuses by examining the content or quality of academic offerings. The problem with reliance on

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a claim that a state-supported school denied a student due process. *See* Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976). Although the court held that due process requirements do not apply to academic dismissals, it also stated that the school's providing a grievance procedure, which plaintiff did not take advantage of, meant she had not been denied due process in any event. *Id.* at 450.

[110] Successful civil litigation could provide enough deterrence to lessen the problem. While students will and should be successful in some cases, it will be difficult for a large number of student suits to be successful due to adverse court reactions and good defenses in many cases. Also, many students may not be financially able to bring suits due to the high costs of litigation. Small recoveries may rule out the use of contingent fees for attorneys. Finally, most students are surely unaware of this possible route to recovery.

[111] *See, e.g.*, OHIO REV. CODE ANN. ch. 1713 (Page Supp. 1975).

accrediting associations is that this is essentially what they are supposed to do now and complaints still arise.[112] And since accrediting associations have been accused by some of being "clubbish" and self-serving, perhaps an examination by them would only be superficial.

Some have argued that the solution to this problem is not to be found in any one approach but rather must come from a "tripartite" attack.[113] This approach emphasizes that the federal government, state governments, and private accrediting associations all have a role to play in the process of outside regulation of consumer abuses in higher education. Certainly this is the route that will have to be taken, in conjunction with self-regulation by the schools, for no single reform is going to eliminate the problem. "Consumer protection and higher education" is a very broad, catchall phrase that spans many types of abuses, so it would be naive to think that any one change will make all aspects of this complex problem disappear. The deterrence of civil litigation will help, as will criminal sanctions, but neither will be feasible in all cases. Governmental or private regulation, as well as self-regulation, will help cut down on abuses, but cannot eliminate all of them. It will only be a combination of some or all of these remedial steps that will be able to effect a significant reduction in these problems.

J. Douglas Drushal

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[112] A school might want to argue that being accredited is a stamp of approval on its academic programs, thus precluding any suits based on the shortcomings of these programs.

[113] This term was coined by Joseph Clark, Commissioner of the Indiana Private School Accrediting Commission, in testimony before the Congress, according to a letter to the author from Mr. Clark. For a discussion of the various roles of state and federal governments and private accrediting agencies, see Davidson and Stark, *The Federal Role*, Callan and Jonsen, *The State Role*, and El-Khawas, *Clarifying Roles and Purposes*, in PROMOTING CONSUMER PROTECTION FOR STUDENTS (J. Stark ed. 1976).